

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

CHRISTOPHER CARR, ROXANNE CLAYTON, ) 3:09-cv-00584-ECR-WGC  
and BRIAN BENNETT, ) (Base Case)

Plaintiffs,

vs.

Order

INTERNATIONAL GAME TECHNOLOGY, et  
al.,

Defendants.

RANDOLPH K. JORDAN and KIMBERLY J. ) 3:09-cv-00585-ECR-WGC  
JORDAN, ) (Member Case)

Plaintiffs,

vs.

INTERNATIONAL GAME TECHNOLOGY, et  
al.,

Defendants.

Plaintiffs are former employee participants in Defendant International Game Technology's ("IGT") profit-sharing plan (the "Plan") who have brought a class action suit pursuant to Federal Rule of Civil Procedure ("FRCP") 23 to allege breach of fiduciary duty claims under Section 502(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(2). Now pending before the

1 Court is Plaintiff's Motion for Class Certification and Related Relief  
2 (#106).

3  
4 **I. Background**

5 The Plan is a voluntary defined contribution plan whereby  
6 participants make contributions to the Plan and direct the Plan to  
7 purchase investments with those contributions from options pre-  
8 selected by Defendants, which are then allocated to participants'  
9 individual accounts. While the parties disagree as to whether the  
10 terms of the Plan mandate that IGT stock be offered as an investment  
11 option, the IGT Stock Fund was offered during the relevant period  
12 and its performance provides the basis for this suit.

13 Plaintiffs filed the amended complaint (#36) on March 10, 2010,  
14 alleging several breaches of fiduciary duty under ERISA § 502(a)(2).  
15 On March 16, 2011, we issued an order (#80) in which we granted in  
16 part and denied in part Defendants' motion to dismiss (#40) and  
17 denied Defendants' motion for summary judgment (#44) and Defendant  
18 IGT Profit Sharing Committee's alternative motion for summary  
19 judgment (#46). We dismissed the following claims: failure to avoid  
20 conflicts of interest against all Defendants; breach of prudence and  
21 loyalty with respect to the imprudent investment of Plan assets  
22 against all Defendants; breach of prudence and loyalty with respect  
23 to failure to disclose material facts regarding the Plan against  
24 Defendants Siciliano and the Director Defendants; co-fiduciary  
25 liability against all Defendants under 29 U.S.C. § 1105(a)(1) and  
26 (a)(3) and against Defendant Siciliano under § 1105(a)(2).

1 Therefore, only the following claims remain: (i) Plaintiffs' claim  
2 that IGT and the Committee breached their fiduciary duties by  
3 failing to provide complete and accurate information about the IGT  
4 stock to the Plan Participants (the "communications claim"), (ii)  
5 Plaintiffs' claim that the Director Defendants breached their duty  
6 to monitor the Committee (the "monitoring claim"), and (iii) breach  
7 of co-fiduciary duty pursuant to 29 U.S.C. § 1132(a)(2) with respect  
8 to (i) and (ii) (the "co-fiduciary claim").

9 On June 14, 2011, Plaintiffs filed a motion for class  
10 certification (#106). Defendants responded (#117) on August 29,  
11 2011, and Plaintiffs replied (#120) on September 23, 2011.  
12 Defendants filed supplemental authority (#123) on January 13, 2012,  
13 to which Plaintiffs responded (#126) on January 23, 2012.

## 14 **II. Legal Standard**

15 A motion for class certification involves a two-part analysis.  
16 First, the Plan Participants must demonstrate that the proposed  
17 class satisfied the requirements of Federal Rule of Civil Procedure  
18 23(a): (1) the members of the proposed class must be so numerous  
19 that joinder of all claims would be impracticable; (2) there must be  
20 questions of law and fact common to the class; (3) the claims or  
21 defenses of the representative parties must be typical of the claims  
22 or defenses of absent class members; and (4) the representative  
23 parties must fairly and adequately protect the interests of the  
24 class. FED. R. CIV. P. 23(a). Second, Plaintiffs must meet the  
25 requirements of at least one of the subsections of Rule 23(b).  
26 Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1186 (9th  
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1 Cir. 2001). The party seeking certification must provide facts  
2 sufficient to satisfy the requirements of Rule 23(a) and (b).  
3 Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1308-09 (9th Cir.  
4 1977). Although the Court has "broad discretion" to certify a  
5 class, it must rigorously assess whether the moving party has met  
6 its burden. Zinser, 253 F.3d at 1186. The certification of a class  
7 is "an exception to the usual rule that litigation is conducted by  
8 and on behalf of the individual named parties only." Wal-Mart  
9 Stores, Inc. v. Dukes, -- U.S. --, 131 S.Ct. 2541, 2550 (2011)  
10 (quoting Califano v. Yamasaki, 442 U.S. 682, 700-01 (1979)).

### 11 12 III. Discussion

13 Plaintiffs seek to certify the following class:

14 All persons, other than Defendants, who were participants  
15 in or beneficiaries of the Plan at any time between  
16 November 1, 2007, through and including April 23, 2009,  
17 and whose account included investments in IGT Stock.

18 Plaintiffs argue that they have satisfied the requirements of  
19 Rule 23(a) and (b). Defendants argue that Plaintiffs have  
20 failed to satisfy the commonality or typicality requirements of  
21 Rule 23(a) or show that Plaintiffs are adequate class  
22 representatives. Defendants also argue that Plaintiffs have  
23 not satisfied the requirements in Rule 23(b).

#### 24 **A. Rule 23(a)**

25 To certify a class, the Court must find that the four  
26 prerequisites under Rule 23(a), commonly referred to as  
27 "numerosity," "commonality," "typicality," and "adequacy" exist.  
28

1 For the reasons herein, Plaintiffs have not met their burden of  
2 demonstrating each prerequisite.

3 1. Numerosity

4 Rule 23(a)(1) requires that "joinder of all members is  
5 impracticable." Here, the Form 5500 filed by Plaintiffs with the  
6 Internal Revenue Service (#106-3) indicates that the Plan had more  
7 than 5,000 participants. A class possibly exceeding 5,000 members  
8 renders joinder impracticable. Defendants do not dispute  
9 numerosity. Accordingly, Rule 23(a)(1) is met.

10 2. Commonality

11 The commonality requirement mandates that "there are questions  
12 of law or fact common to the class." FED. R. CIV. P. 23(a)(2).  
13 "Commonality focuses on the relationship of common facts and legal  
14 issues among class members." Kanawi v. Bechtel Corp., 254 F.R.D.  
15 102, 107 (N.D. Cal. 2008). A plaintiff must show that the contended  
16 common question of law or fact is "of such a nature that it is  
17 capable of classwide resolution - which means that determination of  
18 its truth or falsity will resolve an issue that is central to the  
19 validity of each one of the claims in one stroke." Dukes, 131 S.Ct.  
20 at 2551.

21 Plaintiffs' communications claim primarily alleges that  
22 Defendants IGT and the Committee issued overly optimistic and  
23 grossly inflated growth statements, projections, SEC filings, and/or  
24 financial reports and minimized the impact of a slowdown in the  
25 gaming industry. (Am. Compl. ¶¶ 67, 76, 85-86, 90, 99, 107, 116,  
26 124, 145, 174, 201, 208, 216 (#36).) Defendants contend that to the

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1 extent that Plaintiffs allege claims based on a theory of  
2 misrepresentation, Plaintiffs' class should not be certified because  
3 misrepresentation claims depend on individualized questions of  
4 reliance.

5 To prove an ERISA breach of fiduciary duty based on a  
6 misrepresentation, a plaintiff must establish each of the following  
7 elements: (1) the status as an ERISA fiduciary acting as a  
8 fiduciary; (2) a misrepresentation on the part of the defendant; (3)  
9 the materiality of that misrepresentation; and (4) *detrimental*  
10 *reliance by the plaintiff* on the misrepresentation. Harris v.  
11 Amgen, Inc., No. CV 07-5442 PSG (PLAx), 2010 WL 744123, at \*13 (C.D.  
12 Cal. Mar. 2, 2010) (citing In re Computer Scis. Corp. Erisa Litig.,  
13 635 F.Supp.2d 1128, 1140 (C.D. Cal. 2009)) (emphasis in original).  
14 For this reason, many courts within the Ninth Circuit have dismissed  
15 or granted summary judgment on communication claims brought under  
16 ERISA § 502(a)(2) where plaintiffs have failed to establish the  
17 detrimental reliance element of a misrepresentation claim. See,  
18 e.g., Harris, 2010 WL 744123; In re Computer Sciences, 635 F.Supp.2d  
19 1128; Schulenberg v. Rawlings Co., LLC, No. CVN03-0134-HDM(VPC),  
20 2003 WL 22129230, at \*5-6 (D.Nev. Aug. 20, 2003); see also Kenney v.  
21 State Street Corp., 754 F.Supp.2d 288 (D. Mass. 2010) (granting  
22 defendants' motion for summary judgment on misrepresentation claim  
23 brought as a putative class action where named plaintiff testified  
24 that he never read the alleged misrepresentations); Pell v. E.I.  
25 DuPond De Nemours & Co, Inc., 348 F.Supp.2d 306, 315 (D.Del. 2004)

1 (granting Defendants' motion for summary judgment because plaintiffs  
2 could not prove detrimental reliance).

3 In the context of suing on behalf of a plan pursuant to ERISA §  
4 502(a)(2) for breach of fiduciary duty, "[c]ourts disagree as to  
5 whether reliance is a required element of such a claim." Tibble v.  
6 Edison Int'l, No. CV 07-5359 SVW (AGRx), 2009 WL 6764541, at \*3  
7 (C.D. Cal. June 30, 2009) (citing Jones v. Novastar Fin. Inc., 257  
8 F.R.D. 181, 190 (W.D.Mo. 2009). The Ninth Circuit has yet to  
9 address the issue. Id. Courts that find that class certification  
10 is not appropriate with regard to claims for breach of fiduciary  
11 duty based on a misrepresentation theory have reasoned that the  
12 issue of reliance is highly individualized and not suitable for  
13 class treatment. Id. (citations omitted); see also George v. Duke  
14 Energy Retirement Cash Balance Plan, 259 F.R.D. 225, 240 (D.S.C.  
15 2009) (denying certification of misrepresentation claims because  
16 individual reliance issues defeat commonality requirement of Rule  
17 23(a)); In re Merck & Co., Inc. Sec., Derivative, & "ERISA" Litig.,  
18 MDL No. 1658 (SRC), 2009 WL 331426, at \*6 (D.N.J. Feb. 10, 2009)  
19 ("The individual character of the communications claims prevents  
20 concluding that the allege breach has similarly affected the  
21 potential class members. As to the communications claims, the  
22 proposed class fails to satisfy the requirements for certification  
23 under Rule 23.") (footnote omitted); Tootle v. ARINC, Inc., 222  
24 F.R.D. 88, 98 (D.Md. 2004) (denying certification upon determining  
25 that disclosure claim requires individual showings of detrimental  
26 reliance); Wiseman v. First Citizens Bank & Trust Co., 215 F.R.D.

1 507, 510-511 (W.D.N.C. 2003) (reaffirming previous ruling denying  
2 motion for class certification upon finding that each class member  
3 would have to establish reliance).

4 We agree with those courts that find that individual issues of  
5 reliance in a communications claim brought pursuant to ERISA §  
6 502(a)(2) defeat commonality. As noted above, detrimental reliance  
7 is indisputably an element of a claim based on a misrepresentation  
8 theory. Plaintiffs should not be allowed to eschew proving the  
9 causation element of their communications claim because they bring  
10 this action on behalf of the Plan. See Newton v. Merrill Lynch,  
11 Pierce, Fenner, & Smith, Inc., 259 F.3d 154, 172 (3d Cir. 2001) ("If  
12 proof of the essential elements of the cause of action requires  
13 individual treatment, then class certification is unsuitable."). As  
14 the court noted in Merck, "[i]nvestment decisions are highly  
15 individualized, and thus the individual circumstances of the  
16 plaintiffs markedly differ." 2009 WL 331426, at \*6. In order to  
17 prove detrimental reliance, the Plaintiffs would have to establish  
18 that each member of the proposed class relied on the Defendants'  
19 alleged misrepresentation in making his or her decision to invest in  
20 IGT stock. See Hudson v. Delta Air Lines, Inc., 90 F.3d 451, 457  
21 (11th Cir. 1996) (denying class certification in an ERISA case  
22 because requirement that plaintiffs show that all members of the  
23 class would have deferred their retirement had the misrepresentation  
24 not been made defeated commonality); Brandt v. Grounds, 687 F.2d  
25 895, 898 (7th Cir. 1982) (requiring proof of a causal connection  
26 between breach of fiduciary duty and losses incurred). Such proof  
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1 requires an individualized analysis and cannot be presumed from the  
2 behavior of the named Plaintiffs. This case will likely become a  
3 series of individualized analyses once some of the general issues in  
4 common have been resolved. "Judicial economy is not best served by  
5 using a class action in order to engage in such individualized  
6 analyses." Groussman v. Motorola, Inc., No. 10 C 911, 2011 WL  
7 5554030, \*4 (N.D.Ill. Nov. 15, 2011).

8 Further, the Court notes that a number of common issues have  
9 already been resolved in this case by the Court's March 16, 2011  
10 order (#80) granting in part and denying in part Defendants' motion  
11 to dismiss (#40). There, the Court ruled on the nature and extent  
12 of each Defendant's fiduciary status, dismissed Plaintiffs' claim  
13 that Defendants failed to prudently and loyally manage plan assets,  
14 dismissed Plaintiffs' claim for breach of the duty of loyalty  
15 regarding alleged conflicts of interest, and held that Plaintiffs  
16 had standing to bring the instant action on behalf of the Plan in  
17 spite of the covenants not to sue each of them signed at the  
18 termination of their employment. The fact that these issues have  
19 already been resolved distinguishes this case from similar cases  
20 where certification was granted due to the much larger set of common  
21 issues, of which detrimental reliance was only one among many other  
22 issues or not an element of the asserted claims. See, e.g., In re  
23 Fremont Gen. Corp. Litig. v. Pension Benefit Guaranty Corp., 49 EBC  
24 1829 (C.D.Cal. 2010); George v. Kraft Foods Global, Inc., 251 F.R.D.  
25 338 (N.D.Ill. 2008); Kanawi, 254 F.R.D. 102.

1        Additionally, the other two remaining claims, the monitoring  
2 claim and the co-fiduciary claim, are derivative of the  
3 communications claims. Harris, 2010 WL 744123, at \*14 ("A claim for  
4 breach of the fiduciary duty to monitor is derivative of other  
5 claims.") (citing Computer Sciences, 635 F.Supp.2d at 1144); id. ("A  
6 claim for co-fiduciary liability under ERISA requires sufficient  
7 allegations of an underlying breach.") (citing In re Calpine Corp.,  
8 No. C-03-1685 SBA, 2005 WL 1431506, at \*6 (N.D. Cal. Mar. 31,  
9 2005)). For these reasons, the gravamen of what remains of  
10 Plaintiffs' complaint is that Defendants misrepresented the  
11 financial status of IGT.

12        Plaintiffs' argument that the Supreme Court's recent decision  
13 in CIGNA Corp. v. Amara, 131 S.Ct. 1866 (2011), relieves them of  
14 their burden of proving detrimental reliance as an element of their  
15 communications claim is misplaced. The Amara Court addressed the  
16 need to show detrimental reliance with regard to the type of  
17 equitable remedy sought pursuant to ERISA § 502(a)(3), which  
18 authorizes "appropriate equitable relief" for violations of ERISA.  
19 Id. at 1881. After analyzing principles of the law of equity, the  
20 Court affirmed that when a court exercises authority under §  
21 502(a)(3) to impose a remedy equivalent to estoppel, a showing of  
22 detrimental reliance must be made, but that such a showing may not  
23 be necessary for other types of equitable relief such as surcharge  
24 or reformation. Id. at 1881-82. The Court did not analyze whether  
25 detrimental reliance is an element of a claim for misrepresentation  
26 in violation of fiduciary duties arising under ERISA. As noted

1 above, courts in this Circuit require detrimental reliance by a  
2 plaintiff as the causation element of a misrepresentation claim.  
3 Amara and Plaintiffs' arguments relying thereon are therefore  
4 completely beside the point.

5 Moreover, Plaintiffs are not entitled to a presumption of  
6 reliance. Plaintiffs argue that they are entitled to the Affiliated  
7 Ute presumption of reliance where a securities fraud claim is based  
8 "primarily [on] a failure to disclose" because they have primarily  
9 alleged omissions.<sup>1</sup> Affiliated Ute Citizens of Utah v. United  
10 States, 406 U.S. 128, 154 (1972); see also Cartwright v. Viking  
11 Indus., Inc., No. 2:07-cv-02159-FCD-EFB, 2009 WL 2982887, at \*14  
12 (E.D. Cal. Sept. 14, 2009) (reliance is presumed "where the  
13 plaintiffs have primarily alleged omissions, even though the  
14 [p]laintiffs allege a mix of misstatements and omissions.") (citing  
15 Binder v. Gillespie, 184 F.3d 1059, 1964 (9th Cir. 1999)). The  
16 presumption therefore does not apply to "mixed claims" involving  
17 allegations of both affirmative misrepresentations and omissions  
18 unless the alleged omissions form the primary basis of the claim.  
19 Poulous v. Caesars World, Inc., 379 F.3d 654, 666 (9th Cir. 2004).  
20 While the Court agrees that detrimental reliance may be presumed  
21 where plaintiffs primarily allege omissions, that is not the case  
22 here. It cannot be said that the thrust of Plaintiffs' allegations  
23 is that Defendants failed to disclose material information to Plan

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26 <sup>1</sup> Plaintiffs do not dispute that they are not entitled to the  
27 fraud-on-the-market presumption adopted by the Supreme Court in  
28 securities fraud claims in Basic Inc. v. Levinson, 485 U.S. 224, 228,  
241 (1988).

1 participants. While Plaintiffs may attempt to style the alleged  
2 misrepresentations as failures to disclose the truth of the IGT's  
3 financial health, Plaintiffs primarily complain of inflated and  
4 overly optimistic press releases and growth projections. Plaintiffs  
5 have presented a mixed claim and are therefore not entitled to the  
6 Affiliated Ute presumption of reliance.

7 For these reasons, Plaintiffs have failed to establish  
8 commonality as required by Rule 23(a)(2) and class certification  
9 will be denied.

10 3. Typicality

11 The third requirement of Rule 23(a) is that a plaintiff must  
12 show that the "claims or defenses of the representative parties are  
13 typical of the claims or defenses of the class." FED. R. CIV. P.  
14 23(a)(3). In examining typicality, courts consider "whether other  
15 members have the same or similar injury, whether the action is based  
16 on conduct which is not unique to the named plaintiffs, and whether  
17 other class members have been injured by the same course of  
18 conduct." Hanon v. Dataproducts Corp., 976 F.2d 497, 508 (9th Cir.  
19 1992). This requirement serves to "assure that the interest of the  
20 named representative aligns with the interests of the class." Id.  
21 (citing Weinberger v. Thornton, 114 F.R.D. 599, 603 (S.D.Cal. 1986).

22 The Court finds that the claims of the named plaintiffs are not  
23 typical for two reasons. First, each of the plaintiffs have  
24 testified that they did not rely on the alleged misrepresentations  
25 referred to in the amended complaint (#36) in making the decision to  
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1 invest in IGT stock.<sup>2</sup> Plaintiff Carr stated that he never read an  
2 IGT SEC filing or press release in connection with investing in IGT  
3 stock, nor could he otherwise identify any misleading statements.  
4 (Carr Dep. at 37, 43, 46-47 (#117-B).) Plaintiff Kimberly Jordan  
5 testified that she does not know what the relevant SEC filings are,  
6 cannot recall any IGT press releases, and that she did not take any  
7 investment action based on any IGT press release within the last  
8 five years. (K. Jordan Dep. at 28, 31-32 (#117-C).) Plaintiff  
9 Randolph Jordan testified at deposition that he does not recall the  
10 substance of any IGT SEC filing or press release. (R. Jordan Dep.  
11 at 20-23 (#117-D).) Plaintiff Bennett cannot recall any statements  
12 that he relied upon in deciding to invest in IGT stock, nor can he  
13 recall any statements he found misleading. (Bennett Dep. at 98  
14 (#117-E).) Furthermore, he does not recall ever reading an IGT SEC  
15 filing or press release. (Id. at 19-21.) Because none of the named  
16 Plaintiffs averred that they relied on the alleged  
17 misrepresentations in choosing to invest in IGT stock, they have  
18 rejected the gravamen of what remains of the class claims, rendering  
19 their individual claims atypical. See In re BellSouth Corp., ERISA

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21       <sup>2</sup> The Court finds it necessary to clarify that Plaintiffs cannot  
22 now base their communications claim upon "Company-wide emails and  
23 newsletters" (Pls.' Reply Memo. at 1 (#120)) when the complaint  
24 alleges that Defendants made misleading communications to Plan  
25 participants via inaccurate SEC filings, press releases, and other  
26 specific communications with analysts and the press. (See Am. Compl.  
27 ¶¶ 76, 87, 91-97, 103-06, 108-14, 119-21, 135-37, 143 (#36).) Moreover, the Court's previous order (#80) ruled that IGT and the Committee were fiduciaries with regard to communications regarding the Plan only to the extent that Defendants converted the allegedly inaccurate SEC filings, press releases, and other specific communications with analysts and the press into fiduciary communications.

1 Litig., No. 1:02-CV-2440-JOF, 2005 U.S. Dist. LEXIS 46823, at \*35  
2 (Sept. 30, 2005) ("Because the Named Plaintiffs do not believe the  
3 cornerstone argument of three of the counts raised in the complaint,  
4 their claims cannot be typical or common of the putative class.");  
5 see also Lewis v. Casey, 518 U.S. 343, 357 (1996) ("[N]amed  
6 plaintiffs who represent a class must allege and show that they  
7 personally have been injured."); Kenney, 754 F.Supp.2d at 292  
8 ("Here, even if the plaintiff could show that some members of the  
9 class did, in fact, rely on the misrepresentation, the claim fails  
10 because there is no genuine issue of material fact about whether he  
11 relied on it. In fact, individual issues of reliance often present  
12 a bar to class certification.") (citations omitted).

13       Second, all of the named Plaintiffs are former IGT employees  
14 who signed releases in conjunction with their severance agreements  
15 by which they expressly waived the right to bring any claims under  
16 ERISA. Previously, we denied (#80) Defendants' motion for summary  
17 judgment (#44) wherein Defendants argued that Plaintiffs lacked  
18 standing to bring their ERISA claims as a result of the releases.  
19 We concluded that such individual releases could not bind the Plan  
20 and therefore did not release Plaintiffs' claims brought on behalf  
21 of the Plan. See Bowles v. Reade, 198 F.3d 752, 759-60 (9th Cir.  
22 1999). The releases, therefore, do not preclude Plaintiffs from  
23 bringing a claim on behalf of the plan.

24       In the context of a class action suit, however, Plaintiffs'  
25 claims cannot said to be typical of class members who have not  
26 signed releases and/or covenants not to sue. See In re Bellsouth,

1 2005 U.S. Dist. LEXIS 468233, at \*38-39 ("It is true that such  
2 releases could not bind all plan participants. . . . But the Named  
3 Plaintiffs who signed such releases clearly cannot bring claims on  
4 behalf of the class with the same vigor and interest as someone who  
5 had not signed such releases."); see also In re Schering Plough  
6 Corp. ERISA Litig., 589 F.3d 585 (3d Cir. 2009) (concluding that  
7 even if a release does not bar an individual from bringing a §  
8 502(a)(2) claim on behalf of the plan, it may preclude an individual  
9 from serving as a lead plaintiff and/or render her atypical of the  
10 class); Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 313 (5th  
11 Cir. 2007) (rejecting the plaintiffs' argument that similar releases  
12 were irrelevant to certification analysis because claims were  
13 brought on behalf of the plan). Whether any of the other potential  
14 class members executed the same or similar releases, and the effect  
15 of those releases on their claims, are pivotal issues for each of  
16 the putative class members. Further, "class certification is  
17 inappropriate where a putative class representative is subject to  
18 unique defenses which threaten to become the focus of the  
19 litigation." Baffa v. Donaldson, Lufkin, & Jenrette Sec. Corp., 222  
20 F.3d 52, 59 (2d Cir. 2000) (citations omitted). The court concludes  
21 that the named plaintiffs have not satisfied the typicality  
22 requirement because they are subject to unique defenses which  
23 threaten to become the focus of the litigation.

#### 24 4. Adequacy

25 Rule 23(a)(4) requires evidence that "the representative  
26 parties will fairly and adequately protect the interests of the  
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1 class." This element exists where (1) the named representatives  
2 appear able to prosecute the action vigorously through qualified  
3 counsel and (2) the representatives do not have antagonistic or  
4 conflicting interests with the unnamed members of the class.  
5 Lerwill v. Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th  
6 Cir. 1978). In spite of Defendants' arguments to the contrary, the  
7 Court finds that Plaintiffs have made a showing of adequacy  
8 sufficient to satisfy Rule 23(a)(4). Plaintiffs' execution of the  
9 releases at issue does not generate a conflict of interest with  
10 members of the class who have not signed releases. Plaintiffs have  
11 the incentive to maximize the recovery of the Plan because their  
12 assets will be affected, regardless of the effect of the releases.  
13 Defendants do not contest the qualifications of Plaintiffs' counsel.  
14 Accordingly, Rule 23(a)(4) is satisfied.

15 **B. Rule 23(b)**

16 In addition to demonstrating each of the four prerequisites  
17 under Rule 23(a), a plaintiff must also show that at least one  
18 requirement of Rule 23(b) is met. Zinser, 253 F.3d at 1186.  
19 Plaintiffs assert that rule Rule 23(b)(1) or, in the alternative,  
20 Rule 23(b)(3) is met. For the reasons discussed below, Plaintiffs  
21 have also failed to meet the requirements of Rule 23(b) and class  
22 certification must be denied.

23 1. Rule 23(b)(1)(A)

24 Rule 23(b)(1)(A) allows for class certification where  
25 "prosecuting separate actions by or against individual class members  
26 would create a risk of: (A) inconsistent or varying adjudications  
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1 with respect to individual class members that would establish  
2 incompatible standards of conduct for the party opposing the class.”  
3 FED. R. CIV. P. 23(b) (1) (A). For this reason, the Ninth Circuit has  
4 held that class certification under Rule 23(b) (1) (A) is  
5 inappropriate where plaintiffs primarily seek money damages.  
6 Zinser, 253 F.3d at 1193-95 (“Rule 23(b) (1) (A) certification  
7 requires more . . . than a risk that separate judgments would oblige  
8 the opposing party to pay damages to some class members but not to  
9 others or to pay them different amounts.”) (internal quotation marks  
10 and citation omitted); see also In re First Am. Corp. ERISA Litig.,  
11 258 F.R.D. 610, 621-22 (C.D. Cal. 2009) (relying on Zinser to deny  
12 class certification under Rule 23(b) (1) (A) where plaintiffs  
13 primarily sought money damages for breaches of fiduciary duty under  
14 ERISA); In re Syncor Erisa Litig., 227 F.R.D. 338, 346 (C.D. Cal.  
15 2005) (same). Here, Plaintiffs primarily seek money damages:  
16 damages to the Plan and demands that Defendants make the Plan whole  
17 are the primary focus of this action. (See Am. Compl. at 69 (#36).)  
18 Thus, certification is inappropriate under Rule 23(b) (1) (A).<sup>3</sup>

19 2. Rule 23(b) (1) (B)

20 In the alternative, Plaintiffs moves to certify the class under  
21 Rule 23(b) (1) (B). Rule 23(b) (1) (B) allows for class certifications  
22 where:

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25 <sup>3</sup> Although certification for a Rule 23(b) (1) class “may be  
26 appropriate even when monetary damages are involved,” Molski v.  
27 Gleich, 318 F.3d 937, 949 (9th Cir. 2003), Zinser is still controlling  
under Rule 23(b) (1) (A) where the plaintiffs “primarily” seek monetary  
damages.

1 prosecuting separate actions by or against individual  
2 class members would create a risk of: (B) adjudications  
3 with respect to individual class members that, as a  
4 practical matter, would be dispositive of the interests of  
the other members not parties to the individual  
adjudications or would substantially impair or impede  
their ability to protect their interest.

5 FED. R. CIV. P. 23(b)(1)(B). The Supreme Court "counsel[s] against  
6 adventurous application of Rule 23(b)(1)(B)." Ortiz v. Fibreboard  
7 Corp., 527 U.S. 815, 845 (1999).

8 Prior to the Supreme Court decision in LaRue v. DeWolff, Boberg  
9 & Assocs., 552 U.S. 248 (2008), some courts had found similar class  
10 certifications appropriate under Rule 23(b)(1)(B). In re Fremont,  
11 2010 WL 3168088, at \*4 (listing cases). Prior to LaRue, courts  
12 granting certification of § 502(a)(2) claims reasoned that a  
13 plaintiff who forced defendants to pay damages to a plan would alter  
14 the interests of all other potential class members since § 502(a)(2)  
15 claims could only be brought on behalf of a plan. See, e.g., In re  
16 Syncor, 227 F.R.D. at 347 ("If the primary relief is to the Plan as  
17 a whole, then adjudications with respect to individual members of  
18 the class would 'as a practical matter' alter the interests of other  
19 members of the class.") (citation omitted). However, LaRue  
20 eliminated that risk by holding that participants in a defined  
21 contribution plan, such as the Plan here, can bring ERISA §  
22 502(a)(2) claims on behalf of their own individual accounts. 552  
23 U.S. at 256. Because putative class members now have an individual  
24 remedy, they can pursue relief on their own behalf. In re First  
25 Am., 258 F.R.D. at 622. "Moreover, under usual preclusion rules,  
26 the defeat of an individual Plan participant's claim could not  
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1 adversely affect the individual claim of any other Plan  
2 participant.” Id. (citing Blonder-Tongue Labs., Inc. v. Univ. of  
3 Ill. Found., 402 U.S. 313, 329-30 (1971)). Accordingly,  
4 certification is not appropriate under Rule 23(b)(1)(B) because  
5 individual adjudications of the matter would not be dispositive of  
6 the interests of absent members in light of LaRue.

7 3. Rule 23(b)(3)

8 Rule 23(b)(3) provides for class certification where “the court  
9 finds that the questions of law or fact common to class members  
10 predominate over any questions affecting only individual members,  
11 and that a class action is superior to other available methods for  
12 fairly and efficiently adjudicating the controversy.” FED. R. CIV.  
13 P. 23(b). The matters pertinent to these findings include:

14 (A) the class members’ interests in individually  
15 controlling the prosecution or defense of separate  
16 actions; (B) the extent and nature of any litigation  
17 concerning the controversy already begun by or against  
18 class members; (C) the desirability or undesirability of  
19 concentrating the litigation of the claims in the  
20 particular forum; and (D) the likely difficulties in  
21 managing a class action.

22 Id.

23 For the reasons set forth above with regard to the commonality  
24 and typicality requirements of Rule 23(a), the Court finds that  
25 certification under Rule 23(b)(3) is not appropriate as common  
26 questions do not predominate. The fourth element of Plaintiffs’  
27 misrepresentation claim, detrimental reliance by the plaintiff on  
28 the misrepresentation, would require proof that each proposed class  
member relied on the Defendants’ alleged misrepresentations in  
making the decision to invest in IGT stock. See Wiseman, 215 F.R.D.

1 at 510 (citing Hudson, 90 F.3d at 457). Moreover, as noted above,  
2 the Court has already resolved a number of common issues in our  
3 previous order (#80), leaving primarily the misrepresentation claim  
4 for adjudication. As such, certification is not appropriate under  
5 Rule 23(b) (3) because common issues will not predominate over  
6 questions affecting only individual members.

#### 7 8 **IV. Conclusion**

9 Plaintiffs have failed to establish the commonality and  
10 typicality requirements of Federal Rule of Civil Procedure 23(a)  
11 because their misrepresentation claim, the main focus of the  
12 litigation, will require individualized analysis of each putative  
13 class member's detrimental reliance on the alleged  
14 misrepresentations. Moreover, Plaintiffs executed releases  
15 explicitly waiving their right to bring suit under ERISA, rendering  
16 their claims atypical of the putative class. Plaintiffs have also  
17 failed to meet the requirements of Rule 23(b) because they primarily  
18 seek monetary damages, disposition of this case will not adversely  
19 affect absent members in light of LaRue authorizing individual suits  
20 under ERISA § 502(a) (2), and common questions will not predominate  
21 the litigation.

1        IT IS, THEREFORE, HEREBY ORDERED that Plaintiff's Motion for  
2 Class Certification and Related Relief (#106) is DENIED.

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6 DATED: March 16, 2012.

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8 UNITED STATES DISTRICT JUDGE  
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